

PRESERVATION OF SUBROGATION OPPORTUNITIES
IN CATASTROPHIC/MASS DISASTER LOSSES

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The catastrophic/mass disaster loss presents a situation where an insurance company's normal claims adjustment procedures may be modified or not closely followed. The need to adjust a large number of losses in a short period of time, often amid an atmosphere of devastation and chaos, can result in claims adjustment which impairs future subrogation recovery efforts. The first party adjuster's role in such catastrophic losses is crucial to the preservation of subrogation opportunities. The following focuses on what the first party adjuster can do to maximize, preserve, or at least not impair the potential for subrogation recovery.

Liability

Although the majority of catastrophic losses are caused by natural disasters or "acts of God," this does not necessarily mean that there is no potential for subrogation recovery. For instance, the recent Hurricane Andrew in Florida has resulted in claims against the builders of homes which were improperly constructed and were destroyed by wind, while houses similarly situated weathered the storm. The first party adjuster should always be on the lookout for third party liability and should never write off the potential for subrogation recovery in a catastrophic loss.

Damages

The measure of damages which are legally recoverable in a subrogation action often differs from the measure of damages which are payable under the policy. It is important that the adjuster understand the elements of the measure of damages that will be applied in a subrogation lawsuit, and that he/she document the claim file in such a manner that the damages will be easily provable at trial.

The legal measure of damages in California, as in most states, is the difference in the fair market value of the property immediately before and immediately after the accident. If the

damages have been repaired, or are capable of repair, so as to restore the fair market value as it existed immediately before the accident and at a cost less than such difference in value, then the recoverable measure of damage is the cost of such repair rather than the difference in value. (California Approved Jury Instruction, BAJI 14.21.)

PERSONAL PROPERTY

The difference in legally recoverable damages and damages payable under the policy is most distinguishable in personal property losses with a full replacement cost policy. While the adjuster may take great care to determine the replacement cost of a personal property item, there is usually no documentation in the file which shows the fair market value of the item at the time of the loss. Due to the large number of claims involved in a catastrophic loss, and the probability that the litigation will continue for years, it is impractical and often impossible to reconstruct this valuation information at a later date. Accordingly, the adjuster's file should contain all of the information necessary to establish the fair market value of the personal property at the time of the loss.

Evidence necessary to establish the fair market value of an item includes the replacement cost, the purchase price, usage, age, and the condition of the property prior to the loss. The adjuster can establish most of this information by simply interviewing the insured or examining the personal property. For high value items, an opinion of a person who deals in similar goods should be obtained.

REAL PROPERTY

The measure of damages to real property which the subrogation plaintiff will attempt to prove at trial will, in most cases, be the cost of repairing the property. With the exception of a building which is a total loss, the cost of repair will nearly always be less than the difference in the fair market value of the building. Whenever possible, the adjuster should obtain repair

estimates from licensed contractors and include such estimates in their files. Estimates which itemize the repairs are preferred over a lump sum estimate. An adjuster's worksheet which sets forth each item of damage and provides an estimated cost of repair for each item should be included in the file as well.

In the event the insured has made or will make his/her own repairs, the insured's overhead and profit margin is not recoverable. Material cost receipts and a record of the time spent by the insured in making the repairs should be included in the adjustment file whenever possible.

SALVAGE

While items which are sold for salvage are usually noted in the adjuster's file, it can also be important to make a notation regarding items which have no salvage value. Defendants will often claim that plaintiff has failed to mitigate its damages by not salvaging items with value. Once the adjuster has established that there is no salvage value, attempts made to salvage the item and the reason why there is little or no salvage value should be recorded in the adjuster's file.

Causation

In addition to proof of damages, the first party adjuster can also play an important role in establishing causation. To prevail in a subrogation lawsuit, the plaintiff must prove that there was a causal link or nexus between the damage complained of and the exposure for which the defendant is allegedly responsible. An adjustment file which contains detailed and accurate information regarding causation can save a great deal of time and expense in proving such causation at trial.

Causation problems often arise in catastrophic/mass disaster litigation when occurrences other than the catastrophe could feasibly have been the cause of the damages. For example, a windstorm damages the roofs of hundreds of homes, and two days later an explosion's shock

wave also damages the roofs of the same homes. Since both types of damages are covered losses under the policy, the adjuster will often pay the insured for all of the damages without documenting the different causes of the damage. This affords defendants the opportunity to contend that all of the roof damage was caused by the windstorm rather than the explosion. As illustrated by this example, it is very important that the adjuster document the file as to the cause of the damage even if it is obvious at the time. In most situations, this can be as simple as writing a few sentences in the adjuster's diary. However, on large items of damage where causation is an issue, the retention of an engineer may be appropriate.

Similar causation problems exist when the catastrophe enhances pre-existing damages. An example of this is a situation where preexisting cracks in a concrete driveway become larger as a result of the catastrophe. In such situations, the adjuster should, to the best of his/her ability, document the file regarding the size and cause of the pre-existing crack, and how and to what degree it was enhanced by the catastrophe.

Photographs

The first party adjuster should supplement the adjustment file with photographs and videos of the damages whenever possible. This is particularly important where issues of causation, enhancement of pre-existing damage, proper repair methods or salvage are involved. The old saying, "A picture is worth a thousand words," rings very true when attempting to prove a case years after the incident.

Subrogation Receipts

The adjuster should make sure that a subrogation receipt is signed by the insured and included in the claim file. In the event a supplemental payment is made on the claim, a new

subrogation receipt which reflects the total amount paid to the insured should be signed and placed in the file.

For a more detailed discussion of subrogation receipts, see "Subrogation Receipts and Their Effect: The Implications of Mock v. Michigan Millers" by Gerard P. Harney, Esq.

Proof of Loss

A sworn statement in proof of loss is not required as a prerequisite to subrogation recovery. However, the statement can be useful as additional evidence in proving the subrogation claim. Most insurance companies require that the proof of loss be signed prior to issuing payment to the insured. If a sworn statement in proof of loss has been signed by the insured, it should be included in the adjuster's file.

CONCLUSION

What the claim file should contain:

1. A complete copy of each insured's policy, including the declarations page and any endorsements, amendments, etc. in each claim file.
2. Signed copies of subrogation receipt for final loss, proof of loss statement, and assignment of the deductible.
3. Copies of all checks paid to the insureds, contractor estimates, receipts, adjuster worksheets, and a summary of damages.
4. The adjuster's diary should include references to causation whenever possible. If engineering reports are obtained they should be included in the claim file.
5. The original prints of photographs should be kept with the file. Negatives should be retained for future copying.